STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
CASE NO. 157738

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff/Appellee,
v

DEMARIOL BOYKIN,

Defendant/Appellant.
_____/

MI COA: 335862
Kent Cty. Circuit Ct.
#03-004460-FC

APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

Oral Argument Requested

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Demariol Boykin was convicted of first degree murder from an incident on January 29, 2003 when he was 17.

On December 4, 2003 he was sentenced to life plus two years for felony firearm (2a).

Due to *Miller v Alabama*, 567 U.S 460 (2012) a resentencing was ordered. The prosecutor did not seek a life sentence. On October 28, 2016 Demariol Boykin was sentenced to 40-60 years (23a).

On October 22, 2016 Appellate counsel was appointed.

On March 20, 2018 the Court of Appeals filed a Per Curiam Decision affirming the trial judge. A dissent was filed noting that the sentencing judge was unable or unwilling to consider the *Miller* factors. In the Court of Appeals, Demariol Boykin was represented by court assigned counsel; his indigence status has not changed.

On May 9, 2018 Defendant filed an Application for Leave to Appeal to the Michigan Supreme Court.

On June 4, 2021 the Supreme Court ordered supplemental briefs.

STATEMENT OF QUESTIONS PRESENTED

I. DOES JUVENILE LIFER RESENTENCING TO 40-60 YEARS FAIL WHEN IT IGNORES THE MANDATE THAT FOR SENTENCING PURPOSES CHILDREN ARE DEVELOPMENTALLY DIFFERENT THAN ADULTS?

Defendant/Appellant says, "Yes."

STATEMENT OF THE CASE

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Due to *Miller v Alabama,* 567 U.S. 460 (2012), resentencing was ordered. The prosecutor did not seek a life sentence. On October 28, 2016 Demariol Boykin was sentenced to 40-60 years (23a).

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On May 19, 2018 Demariol Boykin's Application for Leave to Appeal to the Michigan Supreme Court was filed.

On June 4, 2021 the Supreme Court ordered a supplemented brief:

". . . The appellant shall file a supplemental brief addressing: (1) whether the Court of Appeals correctly held in *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), that trial courts must consider the distinctive attributes of youth, such as those discussed in *Miller v Alabama*, 567 US 460 (2012), when sentencing a minor to a term of years pursuant to MCL 769.25a; (2) if *Wines* was correctly decided, whether sentencing judges have an obligation to explicitly set forth their analysis of how the defendant's age impacted their sentencing discretion when proceeding under MCL 769.25a or MCL 769.25; and (3) if *Wines* applies to this case, whether the trial court complied with its requirements, and if it did not, what more the court was required to do."

STATEMENT OF FACTS

Demariol Boykin spent most of his childhood on the west side of Chicago with a caring mother and mostly absent father due to multiple incarcerations in Michigan. He became involved in the drug culture in Chicago and acquired convictions for possession and sale of drugs at the ages of 14 and 15. His mother realized his downward path and arranged for him to move in with his father in July of 2000. He joined a family of half-siblings but unfortunately, he found himself living in the heart of the gang environment in Grand Rapids, Michigan. Even so, his only brush with law enforcement occurred in 2002 with a misdemeanor charge of "frequenting an illegal business." Still, as so many of our youth have done, he acquired a gun "for protection" during his stay with his father. Sadly, only five months after he moved in with his father, his mother passed away from a brain aneurysm. (Defendant's Sentencing Memorandum, p. 2; Pre-sentence pre-investigation report, agent and Defendant's description of the offense, page 2; and DOC psychological report, p. 1.) (3a)

On the date of the shooting, the Defendant's half-brother was involved in an altercation with the victim. Apparently, the deceased was more physically imposing than Mr. Boykin's half-brother, so he retreated and called his other half-brother. He, in turn, called the Defendant and they all eventually got into a car with their father and drove to confront the deceased for a "fair fight." Whatever

the circumstances, the Defendant does not dispute that eventually all three brothers, with tacit approval from their father, began to assault the deceased. In the heat of the encounter, the Defendant pulled out his gun, the deceased began to flee, but the Defendant fired some shots at him and eventually hit him in the abdomen and arm. The three of them started kicking the deceased on the ground. The Defendant admits to attempting to shoot him again, but the gun apparently jammed. The three brothers then left with their father. *Id.*

A review of Demariol Boykin's prison conduct history reveals a fair number of documented misconducts. He has incurred 16 incidents: 5 were for possession of alcohol, (1 of which included possession of rolling papers and a cell phone); 4 were for being out of place (2 of which were for playing chess); 1 was for possession of unknown blue pills; 1 possession of a gambling betting slip; 2 possession of homemade knives, 1 misuse of a phone PIN; 1 consensual sexual misconduct with another prisoner; and 1 incident involving photographs of people wearing gang symbols as well as drawings as well as paper related to the gang symbols. THERE ARE NO ASSUALTS, NO ISSUES OF ARGUMENTS OR EVEN DISTURBING THE PEACE OF ANY FACILITY. TO BE SURE, THESE INCIDENTS REFLECT IMPROPER BEHAVIOR, BUT NONE OF THEM IDENTIFY THE DEFENDANT AS BEING LIKELY TO REPEAT VIOLENT

BEHAVIOR OR TO BE AN UNLIKELY CANDIDATE FOR REHABILITATION. MDOC case report, 8/16/2016. (9a)

Demariol Boykin was a 17 year-old man who had been involved in gang activity since he was 9 years old. His environment was so bad that his mother sent him away to Michigan, despite the fact that she was the only solid base he could rely on in life. He moved to Grand Rapids and within six months, his mother suddenly died. Demariol Boykin was surrounded by half-siblings that he did not know that well, and he recognized the need to protect the family. There can be little doubt that family pressure played a role in this offense. Even his father played a role, driving him to the scene knowing that at least the assaults were likely and driving him away from the scene. *Id*. Demariol Boykin's description of the offense in the original pre-sentence report is illustrative. He remembers that "everything happened so fast, and I was so mad." *Id.* These are not indicators of someone who is incapable or even unlikely to become rehabilitative. Demariol Boykin does not diminish the severity of this offense. The deceased and his family have suffered the ultimate loss. The quick escalation to violence was alarming. However, Demariol Boykin's record since his imprisonment should be reassuring. Despite the unlikelihood of his ever being released, he has not committed one violent act during his stay with the MDOC. At Brooks Correctional Facility he

was housed in the lowest management level available to "lifers" in the MDOC: Level II.

Demariol Boykin is truly remorseful for his actions as indicated in his allocution. (Resentencing p. 13-14). (17a). Letters of support from family members were included for the sentencing Judge's review. It is particularly noteworthy that Demariol Boykin's major motivation is to provide whatever support he can to his now 13 year old daughter.

I. JUVENILE LIFER RESENTENCING TO 40-60 YEARS FAILS WHEN IT IGNORES THE MANDATE THAT FOR SENTENCING PURPOSES CHILDREN ARE DEVELOPMENTALLY DIFFERENT THAN ADULTS

A. Introduction

The United States Supreme Court has signaled that whatever sentence is imposed on a juvenile offender, the juvenile must be afforded a "meaningful opportunity to obtain release based on a demonstrated maturity and rehabilitation." U.S. Const. Amends. V, VI, VIII and XIV; *Graham v Florida*, 560 U.S. 48 (2010); *Miller v Alabama*, 567 U.S. 460 (2012); *Montgomery v Louisiana*, 577 U.S. _____ (2016); and *Roper v Simmons*, 543 U.S. 551 (2004). Here, Demariol Boykin has been resentenced to 40-60 years, the maximum; at 30 years of age, he will likely

die in prison – something the *Miller* Court stated should be an uncommon outcome:

> [G]iven all we have said in *Roper*, *Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest, possible penalty will be uncommon. *Miller, supra*.

Demariol Boykin was tried and convicted of first degree murder for an incident that occurred on January 29, 2003 when he was 17. On October 28, 2016 resentencing occurred. See, *Miller, supra*; and *Montgomery, supra*; and MCL 769.259. At resentencing, the prosecutor opined that Demariol Boykin probably did not qualify for a light sentence and deserves the maximum the court can give him. (Resentencing p. 4). (6a)

In 2000 at 15 years old, Demariol Boykin had moved from his mother's house in Chicago to his father's house in Grand Rapids. He joined a family of half-siblings, and unfortunately found himself living in a gang environment. He acquired a gun "for protection" (Defendant's Memorandum on Sentencing). (3a).

On the date of the shooting, the Defendant's half-brother was involved in an altercation with the victim. Apparently, the deceased was more physically imposing than Mr. Boykin's half-brother, so he retreated and called his other half-

brother. He, in turn, called the Defendant and they all eventually got into a car with their father and drove to confront the deceased for a "fair fight."

The sentence is 40-60 years. The Judge proceeded to impose the most severe penalty possible as though Demariol Boykin was not a child. The sentence is contrary to the considerations stated in *Graham* and *Roper* that children are developmentally different from adults for sentencing purposes. Their "lack of maturity", and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk taking. They "are more vulnerable….to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.* And because a child's character is not as "formed" as an adults, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievable depravity." *Id.* *Roper* and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham's* flat ban on life without parole was for non-homicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life without parole sentence for a juvenile even as its categorical bar relates only to non-homicide offenses. Most fundamentally,

Graham insists that youth matters in determining the appropriate necessity of a life time of incarceration without the possibility of parole.

Instead, the Judge focused on his

1. Disagreement with United States Supreme Court;
2. Assessment of facts that failed to recognize that children are developmentally different from adults for sentencing purposes;
3. Assessment of a 2003 Michigan Department of Corrections evaluation that fails to recognize that children are developmentally different from adults for sentencing purposes; and
4. Assessment of Demariol Boykin's prison record which fails to recognize that for sentencing purposes children are developmentally different from adults. (17a).

The Michigan Court of Appeals filed a Per Curiam Opinion with a Dissent. Two Judges found that the *Miller* factors do not apply and that this record represents no abuse of discretion. (24a).

The dissent notes that *People v Wines*, 323 Mich App 343 (2018) (Dkt 336550, 2018) requires the resentencing the court to balance the factors set out in *People v Snow*, 386 Mich App 586 (1972) and in that context must consider the attributes of youth such as articulated in underlying *Miller*:

B. WHEN SENTENCING A MINOR TO A TERM OF YEARS PURSUANT TO MCL 769.25A, TRIAL COURTS MUST CONSIDER THE DISTINCTIVE ATTRIBUTES OF YOUTH, SUCH AS THOSE DISCUSSED IN MILLER V ALABAMA*, 567 US 460 (2012).*

In *People v Wines*, 323 Mich App 343 (2018), the court held that:

> ". . . when sentencing a juvenile convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court must be guided by a balancing of the *Snow* objectives (punishment, deterrence, reformation and protection of society) and in that context is required to take into account the attributes of youth, such as those described in *Miller*."

In a series of ground-breaking decisions, the Supreme Court has recognized that children cannot be viewed as simply miniature adults." *J.D.B. v North Carolina*, 564 U.S. 261, (2011). In the Eighth Amendment context in particular, the "evolving standards of decency that mark the progress of a maturing society," have led the court to strike down state laws that impose society's harshest punishments on children who break the law. *Estelle v Gamble*, 429 U.S. 97 (1976).

Miller v Alabama, 567 US 460 (2012) rendered life without parole an unconstitutional penalty for a class of defendants because of their status - juvenile offenders whose crimes reflect the transient immaturity of youth.

MCL 769.25(3), (6) and (7) create the motion, hearing, and on the record findings precisely to satisfy *Miller's* dictates for individualized consideration of juveniles convicted of enumerated crimes.

As *Miller* explained, a sentencing scheme that mandates LWOP for juvenile offenders violates the Eighth Amendment because such a scheme "mak[es] youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence" and "poses too great a risk of disproportionate punishment." *Miller*, 567 US at 479. In so holding, *Miller* outlined several mitigating factors unique to juvenile offenders that are given no weight in a mandatory sentencing regime. These "*Miller* factors" include: "chronological age and its hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences"; the juvenile's family and home environment; the circumstances of the offense, including susceptibility to familial and peer pressures; the "incompetencies associated with youth," including an inability to deal with police officers, prosecutors, or defense counsel; and reduced culpability due to age and capacity for change. *Miller*, 567 US at 477-478; see also *People v Skinner*, 502 Mich 89 (2018) (stating that "[MCL 769.25] requires the court to conduct a hearing to consider the *Miller* factors").

In *Roper v Simmons*, 543 US 551 (2004) the Court cites two developments in neuroscience and psychology, the court observed that children in the criminal

justice context are fundamentally different from adults, and held therefore that the Eighth Amendment prohibits the execution of anyone whose offense was committed before the age of 18. 543 U.S. at 569-70. Due to their lack of maturity and underdeveloped sense of responsibility, children are more likely than adults to act recklessly and without considering or even understanding the probable consequences of their actions. *Id*. at 569. They are also more vulnerable than are adults to peer pressure and negative family influences, and less able to extricate themselves from such settings. *Id*. And their characters are not as fully formed as those of adults, meaning they are more capable of reform and rehabilitation over time. *Id.* at 570. These differences, the Court concluded, render young offenders less culpable for their criminal acts than adults, and thus less deserving of society's harshest punishments. *Id* at 571. [1]

Applying and relying on the same principles, *Graham* held that juveniles under the age of 18 who did not kill or intend to kill cannot be punished with life sentences with no opportunity for release. A life sentence without the possibility of parole is similar to the death penalty, the court noted, in so far as it represents a

[1] This section is substantially taken from Plaintiff's Motion for Summary Judgment and Equitable relief in *Hill v Snyder*, No. 10-14568, 2011, Westlaw 2788205 (E.D. Mich, August 12, 2013); attorneys Debra Labelle, Steven M. Watt, and Daniel S. Korobkin, Ronald Reosti, Michael Steinberg and Ezekiel Edwards; Judge Shapiro's dissent in this case; and Chief Justice McCormack's dissents in *People v Skinner*, 502 Mich 89 (2018) and *People v Masalmani*, ____ Mich ____, No. 154773 (2020).

deprivation of liberty that is irrevocable, leaving the offender without hope of ever returning to society. Such harsh punishment is not appropriate for children given their diminished culpability and unique capacity for change and rehabilitation as compared to adults. *Id.*

The Supreme Court's reasoning in *Roper* for prohibiting the death penalty for juveniles, and then applying *Graham* to strike down life without parole sentences imposed on children who commit non-homicide crimes, applies with equal force here. In a post-*Graham* Michigan case involving the resentencing of a youth convicted of a First-Degree homicide, the court, in vacating the life without parole sentence held:

> While this court recognizes the *Graham* Court considered these factors in a non-homicide context, the underlying *Roper* Court considered persuasive, those same factors while considering the culpability of a juvenile murderer. Thus, the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise.

People v Jones (No. 1979-1104-FC), Unpublished Opinion and Order Granting Defendant's Motion for Relief from Judgment of the State of Michigan 9th Circuit Court issued Dec. 2, 2011.

These traits are not peculiar to certain children or subsets of children but rather describe youth as a class. *See J.D.B., supra.* Accordingly, when evaluating any child offender's culpability, youth is, in every case, a significant mitigating factor, its universal relevance "deriving from the fact that the signature qualities of

youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside, and indeed they usually do." *Roper, supra*.

Here, the Judge's sentence is the antithesis of the United States Supreme Court mandate that:

> [G]iven all we have said in *Roper, Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest, possible penalty will be uncommon. *Miller, supra.*

The Judge's measure of this situation is basically that there is a lack of self-defense; an adult sentence assessment. The Judge is obsessed with his disagreement with the underlying *Miller* and, ultimately, the Judge fails to engage in the United States Supreme Court's mandated analysis.

Standard of Review

Here, Demariol Boykin's circumstances reflect Demariol Boykin's vulnerability to outside pressures, being called to the scene by his father and step-brothers to defend their family. The situation is classic recklessness, impulsivity and heedless risk taking. *People v Hyatt*, 314 Mich App 140 (2016) No. 325741, stated that a reviewing court should apply a "searching inquiry into the record and understanding that, more likely than not, the sentence imposed is disproportionate." *Id*. at 26. The court noted that MCL 769.25 requires discretion

of the sentencing court in weighing a variety of factors in determining a juvenile life without parole sentence. However, upon appellate review, the court must be cautious of an abuse of discretion if "a sentencing court fails to consider a relevant factor that should give significant weight to an improper or irrelevant factor." See *United States v Haack*, 403 F.3d. 997, 1004 (8th Circuit 2005). *See* also U.S. Const. Amends V, VI, VIII and XIV; *see* also *Graham, supra*. The factors relied on by the Judge base this sentence on prohibitive inaccurate information. *Townsend v Burke*, 334 U.S. 736 (1948).

MCL 769.25(9) authorizes a maximum term-of-years sentence for juveniles convicted of the enumerated offenses based solely on the jury's verdict. The remainder of the statute requires motion + hearing + consideration of the *Miller* factors + a statement of aggravated and mitigating circumstances considered by the court and reasons supporting its sentence.

C. JUDGES HAVE AN OBLIGATION TO EXPLICITLY SET FORTH THEIR ANALYSIS OF HOW THE DEFENDANT'S AGE IMPACTED THEIR SENTENCING DISCRETION WHEN PROCEEDING UNDER MCL 769.25A OR MCL 769.25.

In *People v Wines*, 323 Mich App 343 (2018), the court held that:

> ". . . when sentencing a juvenile convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court must be guided by a balancing of the *Snow* objectives (punishment, deterrence, reformation and protection of society) and in that context is required to take into account the attributes of youth,

such as those described in *Miller*."

This resentencing fails to consider the sentencing factors and procedures required by an underlying *Miller* and also by General Michigan Sentencing Law; the sentence lacks accurate information, fundamental fairness and due process of law. U.S. Const. Amends V, VI and XIV. *See Townsend v Burke, supra*, and the Court of Appeals Dissent herein.

The Per Curium Opinion affirms the record and sentence herein:

> The trial court, therefore, was not compelled to consider the *Miller* factors.
>
> We conclude that the trial court did not abuse its discretion in imposing a sentence of 40 – 60 years imprisonment for Defendant's conviction of First Degree Murder.

The dissent notes this record shows the trial judge was either unable or unwilling to conduct a proper resentencing:

> I respectfully dissent. In *People v Wines*, 323 Mich App 343, (2018) (Docket No. 336550); slip op. at 4, we held that when sentencing
>
> a person who was less than 18 years old at the time of the crime, the court should balance the factors set out in *People v Snow*, 386 Mich App 586; 194 NW2d 314 (1972), and in that context, consider the attributes of youth such as those articulated by the Supreme Court in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In this case, the sentencing judge was either unwilling or unable to do so. Accordingly, I would vacate defendant's sentence and remand for sentencing before a different judge.
>
> . . . .

> The judge's explicit agreement with the view that a 16 year old is a "grown man" leaves little doubt that he either did not understand *Miller* or was unwilling to follow it.

Further, on several occasions, the trial court noted that defendant was only 80 days short of his 18th birthday when the crime occurred, and suggested that his proximity to that birthday lessened the need to consider the attributes of youth. This is plainly wrong. *Miller* defines a bright line at age 18, which we adopted in *Wines*. The judge repeated this view twice more during sentencing, stating that the defendant was "far older" than the defendants in *Miller*. Perhaps, most compelling was the trial court's conclusion that "[t]he defendant was certainly of a mature age and cannot blame youth or immaturity . . . for this conduct." The trial court's conclusion that at age 17, the "defendant was certainly of a mature age" is *completely* contrary to *Miller* in which the Supreme Court opined:

> [Minors] are developmentally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. [*Miller*, 567 US at 471 (quotation marks and citations omitted).

The most natural reading [of MCL 769.25] requires a trial court to make factual findings beyond those found by the jury before it can impose an LWOP sentence on a juvenile, because the statute requires a statement of aggravated and mitigating circumstances considered by the sentencing court, as well as reasons supporting the court's sentencing decision, before the court may impose life imprisonment without the possibility of parole.

There is no legal or precedential support to conclude that the attributes of youth, such as those described in *Miller*, should be considered only when the sentence of life without parole is sought.

The U.S. Supreme Court in *Roper* anticipated the trap that our trial courts have fallen into. *Roper*, 543 US at 572-73. Our Michigan courts, presented with only one case and only one individual to be sentenced in a hearing without procedural parameters have, in some instances, ignored the mitigation of youth and, in other instances, like that of Mr. Masalmani, made youth an aggravating factor. The *Roper* Court recognized the "unacceptable likelihood [] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability and lack of true depravity should require a sentence less severe than death." *Roper*, 543 US at 573. *Roper* fretted

that "[i]n some cases a defendant's youth may even be counted against him," despite the constitutional requirement otherwise. *Id*. The *Roper* Court chose a categorical ban, but also noted that "this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked." *Id.* This is exactly the rule that the Court must implement now.[2]

In *Wines*, the court noted the very substantial effect of a trial court's analysis of age factors:

> "The range of potential minimum terms under MCL 769.25a is very substantial, from 25 years to 40 years. There are no sentencing guidelines to guide a trial court's exercise of discretion within that very substantial range. A defendant sentenced to the lesser of these possible terms chosen will allow a 17 year old to seek parole consideration when he is 42 years old; the latter minimum sentence prevents parole consideration until 57. And since release at a first parole date is by no means assured, and inmate life expectancy is statistically low, the latter sentence virtually assures that the defendant will not be released until he is geriatric, while the former sentence would allow a defendant to be released at an age when reentry into broader society is likely."

In *Jones v Mississippi*, 593 US ___ (2021), in dissent Justice Sotomayor noted the actual effect of failing to require an explicit analysis of age factors:

> "In any event, the data since *Miller* prove that sentencing discretion alone will not make LWOP a rare sentence for juvenile offenders. Even after *Montgomery*, Mississippi courts require only that a sentencer consider youth-related factors 'in a non-arbitrary fashion' before imposing a sentence of LWOP. See, *e.g., Miller v*

[2] This paragraph is taken from Kimberly Thomas, Amicus Curia Brief, *People v Masalmani*, ____Mich ___, No. 154773(2020) p. 20.

State, ___ So 3d ___. ___, 2020 WL 2892820, *5 (Miss. App., June 2, 2020). Unbound by *Miller*'s essential holding, more than a quarter of Mississippi's resentencings have resulted in the reimposition of LWOP. See Brief for Juvenile Law Center et al. as *Amici Curiae* 20.

Pennsylvania, in contrast, has recognized that '*Miller* requires far more than mere consideration of an offender's age,' as 'a life-without-parole sentence imposed on a juvenile is illegal' unless 'the defendant will forever be incorrigible, without any hope for rehabilitation.' *Commonwealth v Batts*, 630 Pa. 401, 440, 444, 163 A. 3d 410, 433, 435 (2017). Pennsylvania has adopted a number of procedures to guide sentencing courts in applying *Miller*'s rule, including a presumption against juvenile LWOP that the State must rebut through proof beyond a reasonable doubt. 640 Pa., at 476, 163 A. 3d, at 454-455. Fewer than 2 percent of resentencings in Pennsylvania have resulted in the reimposition of LWOP. See The Campaign for the Fair Sentencing of Youth, Tipping Point: Majority of State Abandon Life-Without-Parole Sentences for Children 7 (2018)."

Of course, the iconic example of ignoring the *Miller* scientific data of age factors is in this case as follows:

D. JUDGE IGNORANCE AND REFUSAL TO CONSIDER THE DISTINCTIVE ATTRIBUTES OF YOUTH REQUIRE RESENTENCING.

Non compliance:

The Judge's explicit agreement with the view that a 16 year old "is a grown man" leaves little doubt that he either did not understand *Miller* or was unwilling to follow." Dissent Op. 2.

D1 DEMARIOL BOYKIN[3]

Demariol Boykin spent most of his childhood on the west side of Chicago with a caring mother and mostly absent father due to multiple incarcerations in Michigan. He became involved in the drug culture in Chicago and acquired convictions for possession and sale of drugs at the ages of 14 and 15. His mother realized his downward path and arranged for him to move in with his father in July of 2000. He joined a family of half-siblings but, unfortunately, he found himself living in the heart of the gang environment in Grand Rapids, Michigan. Even so, his only brush with law enforcement occurred in 2002 with a misdemeanor charge of "frequenting an illegal business." Still, as so many of our youth have done, he acquired a gun "for protection" during his stay with his father. Sadly, only five months after he moved in with his father, his mother passed away from a brain aneurysm. (Defendant's Sentencing Memorandum, p. 2; Pre-sentence pre-investigation report, agent and Defendant's description of the offense, page 2; and DOC psychological report, p. 1.). (3a).

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[3] This section is substantially taken from attorney Charles Boekeloo's sentencing memorandum.

brother. He, in turn, called the Defendant and they all eventually got into a car with their father and drove to confront the deceased for a "fair fight." Whatever the circumstances, the Defendant does not dispute that eventually all three brothers, with tacit approval from their father, began to assault the deceased. In the heat of the encounter, the Defendant pulled out his gun, the deceased began to flee, but the Defendant fired some shots at him and eventually hit him in the abdomen and arm. The three of them started kicking the deceased on the ground. The Defendant admits to attempting to shoot him again, but the gun apparently jammed. The three brothers then left with their father. *Id.*

A review of Demariol Boykin's prison conduct history reveals a fair number of documented misconducts. He has incurred 16 incidents: 5 were for possession of alcohol, (1 of which included possession of rolling papers and a cell phone); 4 were for being out of place (2 of which were for playing chess); 1 for possession of unknown blue pills; 1 for possession of a gambling betting slip; 2 for possession of homemade knives; 1 misuse of a phone PIN; 1 consensual sexual misconduct with another prisoner; and 1 incident involving photographs of people wearing gang symbols as well as paper drawings related to the gang symbols. THERE ARE NO ASSAULTS, NO ISSUES OF ARGUMENTS OR EVEN DISTURBING THE PEACE OF ANY FACILITY. TO BE SURE, THESE INCIDENTS REFLECT IMPROPER BEHAVIOR, BUT NONE OF THEM IDENTIFY THE

DEFENDANT AS BEING LIKELY TO REPEAT VIOLENT BEHAVIOR OR TO BE AN UNLIKELY CANDIDATE FOR REHABILITATION. MDOC case report, 8/16/2016. (9a).

Demariol Boykin was a 17 year-old man who had been involved in gang activity since he was 9 years old. His environment was so bad that his mother sent him away to Michigan, despite the fact that she was the only solid base he could rely on in life. (3a). He moved to Grand Rapids and within six months, his mother suddenly died. Demariol Boykin was surrounded by half-siblings that he did not know that well, and he recognized the need to protect the family. There can be little doubt that family pressure played a role in this offense. Even his father played a role, driving him to the scene knowing that at least the assaults were likely and driving him away from the scene. *Id*. Demariol Boykin's description of the offense in the original pre-sentence report is illustrative. He remembers that "everything happened so fast, and I was so mad." *Id.* These are not indicators of someone who is incapable or even unlikely to become rehabilitative. Demariol Boykin does not diminish the severity of this offense. The deceased and his family have suffered the ultimate loss. The quick escalation to violence was alarming. However, Demariol Boykin's record since his imprisonment should be reassuring. Despite the unlikelihood of his ever being released, he has not committed one violent act during his stay with the MDOC. At Brooks Correctional Facility he

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Demariol Boykin is truly remorseful for his actions as indicated in his allocution. (Resentencing p. 13-14). (17a). Letters of support from family members were included for the sentencing Judge's review. It is particularly noteworthy that Demariol Boykin's major motivation is to provide whatever support he can to his now 13 year old daughter.

D2 RESENTENCING TO 40-60 YEARS

The sentence is 40-60 years. The Judge proceeded to impose the most severe penalty possible as though Demariol Boykin was not a child. The sentence is contrary to the considerations stated in *Graham* and *Roper* that children are developmentally different from adults for sentencing purposes. Their "lack of maturity," and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk taking. They "are more vulnerable….to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability of extricate themselves from horrific, crime-producing settings. *Id.* And because a child's character is not as "formed" as an adults, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievable depravity." *Id.* *Roper* and *Graham*

emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. This record fails to present the developmentally required resentencing for juvenile lifers; additionally, it fails to present the considerations and due process requirements of any resentencing:

1. Judge's stated disagreement with the United States Supreme Court:

> I appreciate the pain that you continue to suffer, especially in light of the decision of the United States Supreme Court. Perhaps someone will secure a transcript of your remarks and send them to the majority of the United State Supreme Court so they can understand the consequence of their far-reaching decision in your case.
>
> As the prosecution has pointed out, this crime occurred 80 days short of the Defendant's 18th birthday. When I became Judge, I took an oath to follow the law not to create it. And in situations of this, it strains and breaks my little heart to do what I'm mandated to do, and that is to create a sentence within the law as given to me.
>
> (Resentencing p. 11). (19a).
>
> . . . .
>
> Well, I can encourage you to express this message to the United States Supreme Court and the justices who made this resentencing possible. I think sometimes analyzing a situation in a vacuum doesn't produce justice, but it is the rule of law which I am obliged to follow.
>
> (Resentencing p. 12).(19a).

. . . .

> The State of Michigan accords adulthood to those who are 17 years of age or older, the United States Supreme Court, seemingly without any explanation, developed a bright line of 18 years of age. The Defendant certainly was of a mature age and cannot blame youth or immaturity as an excuse for this conduct.
>
> (Resentencing p. 20). (21a).

2. Judge's assessment of facts that fail to recognize that children are developmentally different from adults for sentencing purposes:

> The totality of circumstances here leads the court to draw certain conclusions, he was, as I say, of an age far older than the two Defendants who were the subject of the Supreme Court Opinion.
>
> (Resentencing p. 19). (21a).

. . . .

> This was an intentional act. It wasn't a provocation given over a short period of time. He was summoned to the scene, and his half-brother was enlisted and a ride was secured by his father. And, he brought again, I emphasize, the only weapon that was involved in this episode.
>
> (Resentencing p. 20). (21a).

3. Judge's assessment of 2003 Michigan Department of Corrections Evaluation of Demariol Boykin that children are developmentally different from adults for sentencing purposes:

> The clinical test concluded that he's likely to be defiant against authority, paranoid and impulsive. And that was not an idle conclusion as we look at Defendant's prison record.
>
> (Resentencing p. 19). (21a).

4. Judge's assessment of Demariol Boykin's prison record fails to recognize that children are developmentally different from adults for sentencing purposes.

> Since entering the prison some 13 years ago, he's earned a number of misconducts, spent a considerable amount of time in administrative segregation due to his behavior. Numbers of these misconducts had to do with ingesting intoxicating substances or making intoxicating substance, having gambling paraphernalia, unauthorized use of – I mean, unauthorized placement and the like.
>
> (Resentencing p. 19). (21a).

And so it went with the Judge reading from the 2003 MDOC Psychological evaluation some things about Demariol Boykin's circumstances as a child but the Judge's conclusions are virtually 100% distracted by his disagreement with *Miller* and his assessment of the facts of conviction that failed to recognize that children are developmentally different from adults for sentencing purposes.

Wines sets out the interplay between the required distinctive attributes of youth factors and *Snow*:

> "Further, consideration of these characteristics is in harmony with Michigan's long-established sentencing aims.

> The objectives generally relevant to sentencing were first articulated by the Michigan Supreme Court in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), and have been often reiterated by our Courts. In *Snow*, the Court explained that in imposing sentence, the court should 'balance' the following objectives: '(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses.' *Id*. (citation omitted). The process of properly balancing these objectives in the case of a minor defendant necessitates consideration of the distinctive attributes of youth. For example, consideration of what the Supreme Court described as youth's 'diminished culpability and greater prospects for reform,' *Miller*, 567 US at 471, relates directly to *Snow*'s consideration of reformation and the protection of society. Similarly, the Supreme Court's reference to the 'diminish[ed] ... penological justifications for imposing the harshest sentence on juvenile offenders,' *Id*. at 472, correlates with *Snow*'s inclusion of punishment and deterrence as relevant factors in a sentencing calculus. Taking the distinctive attributes of youth into account is consistent with both Michigan's long-stated sentencing objectives and the United States Supreme Court's judgment that 'youth matters.' We conclude that a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a, so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error.

"It is undisputed that all of [the *Miller*] factors are mitigating factors." *Skinner*, 502 Mich at 115, citing *Miller*, 567 US at 489. But the trial court's treatment of these factors shows that the court did not treat them as mitigating. That is, the court did not consider them for what they are - circumstances and features common to juvenile offenders generally, consideration of which would lead to reasons *not* to impose the maximum sentence allowed by our federal

constitution.

The judge did not treat *Miller*'s mitigating factor as mitigating factors.

> "Further, on several occasions, the trial court noted that defendant was only 80 days short of his 18th birthday when the crime occurred, and suggested that his proximity to that birthday lessened the need to consider the attributes of youth. This is plainly wrong. *Miller* defines a bright line at age 18, which we adopted in *Wines*. The judge repeated this view twice more during sentencing, stating that the defendant was 'far older' than the defendants in *Miller*. Perhaps, most compelling was the trial court's conclusion that '[t]he defendant was certainly of a mature age and cannot blame youth or immaturity . . . for this conduct.' The trial court's conclusion that at age 17, the 'defendant was certainly of a mature age is *completely* contrary to *Miller*.

People v Boykin, *supra*, dissent at pg. 2.

Standard of Review. Abuse of discretion is the standard of sentence review. *People v Snow*, *supra*. De novo review is appropriate where, as here, there is no room for discretion to apply the *Miller* stated factors.

Defendant incorporates by reference, as if more fully restated herein, the points and authorities stated in Defendant's Application for Leave to Appeal herein and in the Supplemental Brief filed in *People v Tate*, No. 158695.

CONCLUSION

Resentencing with a new Judge is required.

Dated: September 23, 2021

/s/ *F. Randall Karfonta*

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